

April 29, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND RECOMMENDATION TO THE METROPOLITAN KING COUNTY COUNCIL

SUBJECT: Department of Transportation file no. **V-2618**
Proposed Ordinance no. **2008-0518**
Parcel no. **510540-0140**

KENNAN AND PATTI SOUTHWORTH
Road Vacation Petition

Location: Portions of 227th Place Southeast (Martin Avenue and an adjacent triangular portion of a 40-foot right-of-way within a private drive)

Petitioners: **Kennan and Patti Southworth**
21670—227th Place Southeast
Maple Valley, Washington 98038
Telephone: (425) 301-5793
E-mail: southhouse@comcast.net

Intervenors: Beverly and Micheal Tonda
represented by **James A. Santucci**
1200 Westlake Avenue North, Suite 809
Seattle, Washington 98109
Telephone: (206) 382-1827
Facsimile: (206) 682-5288
Email: jasantucci@thelanzfirm.com

King County: Department of Transportation, Road Services Division
represented by **John Briggs**, Sr. Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
516 Third Avenue, Room W400
Seattle, Washington 98104
Telephone: (206) 296-9015
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and

Kelly Whiting and Nicole Keller
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SUMMARY OF RECOMMENDATIONS:

Department's Preliminary:	Approve road vacation, subject to easement and compensation
Department's Final:	Approve road vacation, subject to easement and additional compensation
Examiner's:	Deny the petition and additional compensation

DEPARTMENT'S REPORT:

The Department of Transportation's written report to the Hearing Examiner for Item No. V-2618 was received by the examiner on October 7, 2008.

PUBLIC HEARING:

After reviewing the department's report and examining available information on file with the petition, the examiner conducted a public hearing on the petition to vacate the subject right-of-way as follows:

The hearing on Item No. V-2618 and proposed ordinance 2008-0518 was opened and continued by Hearing Examiner Peter Donahue on January 12, 2009, in the King County Courthouse, Olympus Conference Room, Seattle, Washington 98104. The hearing was re-opened by Hearing Examiner pro tem James N. O'Connor on April 13, 2009 in the King County Courthouse, Adams Conference Room, Seattle, Washington 98104 and closed that day. Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the Hearing Examiner.

FINDINGS, CONCLUSIONS & RECOMMENDATION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Road name and location:	Portions of 227th Place SE (Martin Avenue) and an adjacent triangular portion of a 40-foot right-of-way within a private drive
Right of way classification:	Class B and Class C
Area:	4,880 square feet Class B; 3,262 square feet Class C
Compensation:	\$5965.80 deposited for Class B area; additional \$2,079.87 recommended by Department of Transportation for Class C area

2. Notice of hearing on the department's report was given as required by law, and a hearing on the report was opened by the examiner on behalf of the Metropolitan King County Council on

January 12, 2009. The hearing was continued, and was re-opened pursuant to new notice on April 13, 2009.

3. Except as modified herein, the examiner adopts and incorporates by this reference the facts set forth in sections “A” through “D” of the department’s report to the examiner for the public hearing (exhibit 1). The department’s report will be attached to the copies of this report and recommendation that are submitted to the King County Council.
4. Maps showing the vicinity of the proposed vacation and the specific area requested to be vacated are in the hearing record as exhibit nos. 7 and 9. Copies of these exhibits are inserted in this report as pages 3A and 3B.
5. The subject right-of-way segments are not currently opened, constructed or maintained for public use. However, intervenors, Beverly and Micheal Tonda, utilize a portion of the proposed vacation area, together with an easement over the petitioners’ property, as the only feasible legal access to one of their two lots (no. 102206-9159). The intervenors’ second lot (no. 510540-0155) has no legal road access that was documented in the hearing record.

The Tonda’s existing access to their residence on lot no. 102206-9159 is by a private drive to Dorre Don Way SE, over an easement established across the westerly and southwesterly areas of the petitioners’ (Southworths’) property. The easement area is adjacent to the Cedar River Trail to the west and 227th Place SE (Martin Avenue) to the southwest. The southwesterly portion of this access driveway also utilizes the triangular portion of the county right-of-way that is part of the Southworths’ requested vacation area.

6. The Department of Transportation, when reviewing this petition, solicited information from neighboring cities, other King County agencies, and utilities serving the area, to determine if there were objections to the proposed vacation, and to determine whether utility or access easements should be requested as a condition of vacation of the right-of-way. The communication transmitted to the Department of Development and Environmental Services (DDES) resulted in a response from the Land Use Services Division (LUSD) saying that DDES had no objection to the proposed vacation. No information was provided by DDES concerning access to the intervenors’ lots or a pending right-of-way use permit application that affected the proposed vacation area.
7. Early in 2008, the Tondas had applied to LUSD for a right-of-way use permit. The permit application sought permission to construct a private road that would utilize the right-of-way proposed to be vacated by this petition. This private road is intended by the intervenors to provide access to both of their lots (parcel nos. 102206-9159 and 510540-0155).

The right-of-way use permit could facilitate development of both of the intervenors’ lots, consistent with the King County Road Standards (KCRS). The existing privately maintained driveway may serve only two lots, and already serves the existing Southworth and Tonda homes. A road is required to serve three or more lots. (A “road” is defined by the King County Road Design and Construction Standards as “a facility serving three lots or more and providing public or private access...”.) The Tondas’ right-of-way use permit would also enable relocation of the driveway to the intervenors’ residence further to the south, which would reduce conflicts between the petitioners and intervenors.

8. From August 2008 through March of 2009, the intervenors have paid fees to DDES of \$7,801 for the review of their right-of-way use permit application. In addition, intervenors have paid \$32,483 for professional services that included a critical areas assessment, surveys and planning, and for road construction plans to implement the right-of-way use permit. The permit was granted to them by DDES on November 7, 2008.
9. If the road vacation that is the subject of this petition is granted, the right-of-way use permit issued by DDES to the Tondas, as well as the construction plans they have had prepared to implement the permit, will have no substantial value.
10. When recommending the approval of this petition, the Department of Transportation, Road Services Division (RSD) recommended that an easement to the Tondas be provided by the petitioners. RSD transmitted a proposed form of easement to the petitioners that would provide access to the intervenors two parcels and would encumber the two portions of right-of-way proposed to be vacated in this proceeding. The petitioners responded by offering to execute a more limited easement agreement for access to the Tondas' second lot, over a restricted area insufficient to allow construction of a road that would comply with KCRS.
11. That portion of the proposed vacation area known as Martin Way is the northerly 30 feet of a 60-foot wide right-of-way that extends from the Cedar River Trail southeasterly to the intervenors' two lots. The southerly half of the right-of-way is characterized as a "cliff" and has no practical value for either vehicular or pedestrian access between the intervenors' two lots and the existing private driveway or the Cedar River Trail. If the petition for vacation is granted, the intervenors will also be deprived of the direct access they now enjoy to the Cedar River Trail.
12. The benefit to the public of vacating the right-of-way that is the subject of this petition would consist of compensation paid and to be paid by the petitioners to King County in the amount of \$8,045.67, and the return of the vacated area to the tax rolls. There is no evidence of any other benefit that would flow to the public from this proposed vacation.

CONCLUSIONS:

1. The administrative review of this petition for road vacation failed to give substantial consideration to the effect of the proposed vacation upon the pending application for a right-of-way use permit by the intervenors, or any rights that may have accrued to the intervenors by the approval of the right-of-way use permit on November 7, 2008. The right-of-way use permit granted by King County to the intervenors should be considered by King County in making a determination as to whether or not the right-of-way which is the subject of this petition has value as part of the King County road system.
2. The right-of-way proposed to be vacated does have value as part of the King County road system, in that it provides an area within which a portion of the only feasible access to two lots to the east (lot nos. 102206-9159 and 510540-0155) can be constructed consistent with the KCRS. In the absence of the right-of-way proposed to be vacated by this petition, there would be no area available to construct an access to intervenors' two lots consistent with the KCRS.
3. DDES' approval of a right-of-way use permit for the area proposed to be vacated to enable construction of a road consistent with KCRS, demonstrates that the proposed vacation area has utility for road purposes. The area is not useless as part of the King County road system, and this petition for vacation should be denied.

RECOMMENDATION:

DENY proposed Ordinance No. 2008-0518 to vacate the subject road right-of-way.

RECOMMENDED this 29th day of April, 2009.

James N. O'Connor
King County Hearing Examiner *pro tem*

**NOTICE OF RIGHT TO APPEAL
AND ADDITIONAL ACTION REQUIRED**

In order to appeal the recommendation of the Examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of \$250.00 (check payable to King County Office of Finance) *on or before* **May 13, 2009**. If a notice of appeal is filed, the original and six copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the King County Council *on or before* **May 20, 2009**.

Filing requires actual delivery to the Office of the Clerk of the Council, Room 1025, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104, prior to the close of business (4:30 p.m.) on the date due. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the applicable time period. The Examiner does not have authority to extend the time period unless the Office of the Clerk is not open on the specified closing date, in which event delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

If a written notice of appeal and filing fee are not filed within 14 days calendar days of the date of this report, or if a written appeal statement and argument are not filed within 21 calendar days of the date of this report, the Clerk of the Council shall place a proposed ordinance which implements the Examiner's recommended action on the agenda of the next available Council meeting. At that meeting, the Council may adopt the Examiner's recommendation, may defer action, may refer the matter to a Council committee, or may remand to the Examiner for further hearing or further consideration.

Action of the Council Final. The action of the Council on a recommendation of the Examiner shall be final and conclusive unless within 21 days from the date of the action an aggrieved party or person applies for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the action taken.

**MINUTES OF THE JANUARY 12, 2009, PUBLIC HEARING ON DEPARTMENT OF
TRANSPORTATION, ROAD SERVICES DIVISION FILE NO. V-2618.**

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were John Briggs and Nicole Keller, representing the Department; Patti Southworth the Petitioner, and Micheal and Beverly Tonda.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 Report to the Hearing Examiner for the November 12, 2008 hearing (rescheduled to January 12, 2009, with 16 attachments.
- Exhibit No. 2 Petition transmittal letter, dated March 11, 2008 to King County Department of Transportation (KCDOT), from Clerk of the Council
- Exhibit No. 3 Cover letter to petition for vacation of a county road including legal descriptions of petitioners' properties
- Exhibit No. 4 Petition for vacation of a county road including legal descriptions of petitioners' properties
- Exhibit No. 5 Copy of filing fee, check no. 8650, in the amount of \$100
- Exhibit No. 6 Receipt no. 873 for filing fee
- Exhibit No. 7 Vicinity map
- Exhibit No. 8 Plat map of Maple Valley recorded in 1890
- Exhibit No. 9 Map depicting vacation area
- Exhibit No. 10 Final Agency Notice sent May 16, 2008
- Exhibit No. 11 Letter of explanation and request for compensation letter from KCDOT to Petitioners
- Exhibit No. 12 Letter requesting Ingress and Egress Easement and Waiver of Reversionary Rights
- Exhibit No. 13 Compensation Worksheet
- Exhibit No. 14 Recommendation letter from KCDOT to KC Council
- Exhibit No. 15 Letter to KC Hearing Examiner (KCHE) requesting consolidation with Tonda road vacation petition hearing
- Exhibit No. 16 Letter from KCDOT to KCHE explaining issues possibly necessitating consolidated hearing
- Exhibit No. 17 Cover letter to Waiver of Reversionary Rights, Easement and Road Maintenance Agreement and compensation check
- Exhibit No. 18 Waiver of Reversionary Rights
- Exhibit No. 19 RSD proposed Easement and Road Maintenance Agreement
- Exhibit No. 20 Copy of compensation payment, check no. 49719 in the amount of \$5965.80
- Exhibit No. 21 Proposed Ordinance transmittal letter from KCDOT to KC Council dated September 25, 2008
- Exhibit No. 22 Proposed Ordinance 2008-0518
- Exhibit No. 23 Fiscal Note
- Exhibit No. 24 Affidavit of Posting for November 12, 2008 hearing (later converted to a pre-hearing conference on November 3, 2008)
- Exhibit No. 25 Affidavit of Publication for November 12, 2008 hearing (later converted to a pre-hearing conference on November 3, 2008)
- Exhibit No. 26 Affidavit of Posting for January 12, 2009 hearing
- Exhibit No. 27 Affidavit of Publication for January 12, 2009 hearing
- Exhibit No. 28 Memorandum from Department of Development and Environmental Services (DDES) to KCDOT regarding interest in Southworth and Tonda road vacation areas
- Exhibit No. 29 Memorandum from KCDOT to KCHE with updated compensation information

MINUTES OF THE APRIL 13, 2009, PUBLIC HEARING ON DEPARTMENT OF
TRANSPORTATION, ROAD SERVICES DIVISION FILE NO. V-2618.

James N. O'Connor was the Hearing Examiner in this matter. Participating in the hearing were John Briggs, Kelly Whiting and Nicole Keller representing the Department; Kenneth and Patti Southworth the Petitioners; Micheal and Beverly Tonda the Intervenors; James Santucci representing the Intervenors; and Bryan Kelley.

- Exhibit No. 30 Aerial photograph of vicinity of proposed vacation area, taken in 2007
- Exhibit No. 31 Affidavit of posting for April 13, 2009 hearing
- Exhibit No. 32 Letter from Lydia Reynolds-Jones, KCDOT, to Peter T. Donahue, KC Hearing Examiner, dated January 8, 2009 regarding calculation of compensation
- Exhibit No. 33 King County and Local Landmarks List, Technical Paper No. 6, revised March, 2009
- Exhibit No. 34 Emails to/from KCDOT and Nancy Faegenburg and Tom Lew, KC Natural Resources and Parks, Water and Land Resources, regarding access over proposed vacation area for flood control, dated March 17, 2008 through March 2, 2009
- Exhibit No. 35 Email from Russell Link, Washington State Department of Fish and Wildlife, to Nicole Keller, KCDOT, dated March 11, 2009, and preceding emails beginning January 5, 2009, regarding impact of proposed vacation on wildlife movement
- Exhibit No. 36 Email from Micheal and Beverly Tonda to John Briggs, King County Prosecuting Attorney's Office (KCPAO), dated April 10, 2009, regarding easement across proposed vacation area
- Exhibit No. 37 Reply email from John Briggs, KCPAO, to Micheal and Beverly Tonda, dated April 10, 2009
- Exhibit No. 38 Map titled Tonda Private Access Road, created by Plat & Site Civil Design, LLC, for the Tondas' pending Right-of-Way Use Permit application
- Exhibit No. 39 List of Tondas' expenses incurred for right-of-way use permit application and construction plans through April, 2009 (*redacted*)
- Exhibit No. 40 Letter from Randy Sandin, DDES, to Micheal and Beverly Tonda, dated November 7, 2008, approving Right-of-Way Use Permit and detailing design requirements
- Exhibit No. 41 Chicago, Milwaukee & St. Paul Ry. Co. Station Map for Maple Valley, dated August 6, 1915, corrected to June 2, 1921
- Exhibit No. 42 Map associated with Quiet Title Vacation No. V-2247, William Johnson ***not admitted***
- Exhibit No. 43 Letter from Linda Dougherty, KCDOT, to Micheal and Beverly Tonda, dated March 20, 2008, concerning 227th Place SE
- Exhibit No. 44 1995 photograph looking north from Southworth/Tonda common property line, approximately 100 feet south of Dorre Don Way
- Exhibit No. 45 Revised version of Exhibit No. 38
- Exhibit No. 46 Email from Micheal and Beverly Tonda to Stephanie Warden and Randy Sandin, subject: Re: Follow-up on Addressing, sent March 9, 2009, ***not admitted***
- Exhibit No. 47 Letter from John Klopfenstein, King County Fire Marshal, regarding King County safety code compliance, dated September 1, 2006 ***not admitted***
- Exhibit No. 48 Letter from John Klopfenstein, King County Fire Marshal Division, to Ken Southworth, dated September 1, 2006, regarding non-compliance of 227th Place SE with King County Code
- Exhibit No. 49 Photographs of fence erected by Southworths alleged to be within 227th Place SE right-of-way and Cedar River trail ***not admitted***
- Exhibit No. 50 Photographs of fence erected by Southworths alleged to be within 227th Place SE right-of-way (*redacted*)
- Exhibit No. 51 Black and white photograph depicting persons dressed in pre-WWI clothing on shores of Cedar River near old railroad line in vicinity of proposed vacation area. (Origin and date of photograph unknown, description of photograph on its margin illegible.)
- Exhibit No. 52 Photograph of damaged railroad trestle, part of old railroad line over Cedar River in vicinity of proposed vacation area. (Origin and date of photograph unknown.)
- Exhibit No. 53 Photograph of former building on Martin Avenue in vicinity of proposed vacation area. (Origin and date of photograph unknown.)
- Exhibit No. 54 Aerial photograph. (Origin, date and location of photograph unknown.) ***not admitted***

Exhibit No. 55 Letter from Stephanie Warden and Randy Sandin, DDES, to Micheal and Beverly Tonda, dated February 11, 2009, discussing Tonda's engineering plans for proposed right-of-way improvements and clarifying communications at a February 5, 2009 meeting with DDES officials

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